Filed 6/11/19 P. v. Ho CA2/2

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. AMY SAM HO, Defendant and Appellant.	B279939 (Los Angeles County Super. Ct. No. BA395107)
In re AMY SAM HO on Habeas Corpus.	B291923

APPEAL from a judgment of the Superior Court of Los Angeles County. George G. Lomeli, Judge. Reversed and remanded to the trial court.

Eisner Gorin, Alan Eisner and Dmitry Gorin, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Paul M. Roadarmel, Jr., and David A. Wildman, Deputy Attorneys General, for Plaintiff and Respondent.

Cora Sam (Sam), a 60-year-old woman with profound mental retardation, developed pneumonia and severe pressure sores and then died while in the care of her sister, Amy Sam Ho (appellant). Appellant was charged with murder (Pen. Code, § 187, subd. (a); count 1)[1] and elder abuse (§ 368, subd. (b)(1); count 2). The jury found appellant guilty. She was sentenced to 15 years to life on count 1, and eight years on count 2. The sentence on count 2 was stayed pursuant to section 654.

Appellant appeals, arguing that the evidence of implied malice and causation was insufficient to support the convictions,

---

[1] All further statutory references are to the Penal Code unless otherwise indicated.

and that the trial court should have suppressed statements she made to the police. Separately, appellant filed a petition for writ of habeas corpus, case No. B291923, asserting that she received ineffective assistance of counsel at trial.[2]

Because we conclude that trial counsel provided ineffective assistance and prejudiced appellant by failing to put on a mental health defense, offer the testimony of a pathologist, and object to instructional error pursuant to *People v. Kurtzman* (1988) 46 Cal.3d 322 (*Kurtzman*), we must reverse the judgment. This, however, does not necessarily end the case. The judgment was supported by substantial evidence, and therefore the People have the option of trying the case a second time. (*Burks v. United States* (1978) 437 U.S. 1, 11 [if convictions are reversed but otherwise supported by sufficient evidence, a defendant can be retried without violating the Double Jeopardy Clause]; *People v. Morgan* (2007) 42 Cal.4th 593, 613.) In the new trial, if any, the People may once again rely upon the statements that appellant made to the police.

FACTS

Prosecution Evidence

Sam's Age; Her Limits and Needs

Sam was born in July 1951. She had a cerebral malformation that impacted her mental abilities. At 55 years old, she had an IQ of 9 and mental age of 18 months. She was in

---

[2] After review of appellant's briefs, we determined that she was raising significant ineffective assistance of counsel arguments that required, at least initially, inquiry into matters outside the appellate record. So that all relevant issues could be decided together, we invited appellant to file a petition for writ of habeas corpus. She filed a petition, and we issued an order to show cause. Subsequently, we consolidated the petition and appeal for decision.

the profound range of mental retardation; she could walk but not run or jump. A person at her level might be able to hold a spoon and try to feed herself, or scribble with a crayon or pencil. She needed daily assistance with dressing, undressing, hygiene, bathing, and toileting. Sam wore diapers.

Sam's Living Arrangements Over Time; Appellant's Interaction with Care Providers

The State of California covers 100 percent of the cost of care facilities for people like Sam.

Records establish that Sam resided in a care facility from 1984 to 2002. She briefly lived with appellant from November 15, 2002, to April 1, 2003. After that, she went to a different care facility until December 19, 2006, and then back to appellant's home until April 4, 2007. Sam once again resided in a care facility from that date until June 5, 2007, when she lived with appellant for four days.

From June 9, 2007, to September 11, 2008, Sam was staying in yet another care facility. While Sam lived there, appellant was demanding when dealing with the social service designee and, at one point, yelled at her. Nhon Ly (Ly), a social worker employed by the East Los Angeles Regional Center, was Sam's service coordinator from June 2007 to August 2008. Appellant wanted Ly to find a new placement for Sam. Ly found multiple vacancies. However, Ly was never able to meet with appellant at her home to complete an Individual Placement Program (IPP). When Ly tried to schedule a visit, appellant would call and say she was busy. Even though Ly referred Sam to numerous facilities, she was never placed because appellant found something wrong. Though Ly offered respite services that would fund people to help appellant care for Sam, appellant

never asked to take advantage of those services. After Ly mailed information to appellant about In-Home Supportive Services (IHSS), a state funded program to temporarily help a family pay for services such as personal care, housecleaning, meal preparation, laundry, and protective supervision. Appellant told him to stop sending IHSS information. On September 11, 2008, appellant removed Sam from the facility on a home pass and said they were not coming back.

From that point on, Sam lived with appellant.

In January 2009, George Rodriguez (Rodriguez) became the Eastern Los Angeles Regional Center service coordinator for Sam. Appellant informed Rodriguez that caring for Sam was causing her stress due to the economic, physical and psychological burdens. He forwarded the names of facilities with vacancies to her. Thereafter, he regularly provided appellant with the names of facilities as well as relevant contact information. Sam was denied acceptance for placement at various facilities. Rodriguez spoke to the administrators and it appeared she was denied acceptance due to a pattern of appellant wanting to dictate some of the terms of care. Rodriguez explained that an IPP must be updated annually to facilitate the placement of a client in a care facility. The IPP documents the planning for services, the family's wishes, the preferred living arrangements, and the client's current level of functioning. Appellant failed to meet with Rodriguez at any point from 2009 to 2011 to complete an IPP. Rodriguez provided appellant with information about IHSS.

Appellant wrote Rodriguez expressing the need to find a placement for Sam because appellant had carpal tunnel syndrome, a condition that was aggravated by caring for Sam. At

one point, appellant wrote him a letter stating that taking care of Sam had taken a toll on appellant's life, and also stating, "'My family and I [can] no longer take care of [Sam]. We have been taking care of [Sam] since September 11, 2008. Please speed up the Regional Center's process."

During July 2009, Cecilia Cuevas (Cuevas) met with appellant and Sam regarding a vacancy at a care facility. Appellant indicated that she wanted Sam to have a specific type of food. Cuevas explained that everything the facility gave to a client has to be "doctor's orders, it has to be approved by the dietician and the consultants[.]" Moreover, appellant wanted to sleep with Sam on occasion—either next to her, or somewhere else. Cuevas explained that the facility did not allow family members to sleep inside the facility. When appellant was informed that a facility doctor would have final say on Sam's diet, appellant said, "'I don't think it's going to work.'" Even though Sam met the requirements for admission, Cuevas would not have admitted her because appellant wanted Cuevas to change the policies and procedures of the facility.

Subsequently, appellant called Cuevas almost every day for a week. Cuevas provided appellant with referrals for in-home nursing.

In late 2009, Pamela Benson (Benson), the director of a different facility, met with Sam and appellant. Appellant proposed a specific diet and said she would prepare it for Sam. Benson explained that the facility had a dietician that placed each client on an individual diet based on the client's needs. Appellant startled Benson by saying, "'No, no, no, she has to eat this food.'" Benson had been in the business for almost 20 years, and she had never been approached this way by a family

member. She told appellant, "'No, you can't come in here and prepare food.'" According to Benson, appellant said she wanted to come any time of day or night, which was "a problem situation." Sam was a good fit for the facility. But Benson was nervous about accepting Sam because of appellant. After a day of considering the matter, Benson turned Sam down.

In early 2010, Lillian Sestiaga (Sestiaga) of another facility met with Sam and appellant. Appellant was adamant that Sam be given a fish and beans diet, which Sestiaga found "a little odd" because it "didn't seem . . . that there was anything medically wrong with [Sam] that she needed to follow" such a diet. Appellant wanted Sam's food pureed. Sestiaga thought Sam was a good fit for the facility but did not believe the diet specified by appellant could be accommodated. After consulting with a registered nurse and dietician, Sestiaga denied Sam admission.

Sam's medical history from 2003 to 2010

Sam was a patient of a dermatologist from March to December 2003. Appellant transported Sam to and from her appointments. On Sam's first visit in 2003, the dermatologist removed a benign skin growth called dermatrofibroma. During subsequent visits, he treated her for dry skin and a related skin eruption, for patchy, inflamed areas, and for common benign growths. He never treated Sam for pressure sores. When he became aware that appellant was treating Sam's skin conditions with colloidal silver, a popular over the counter product, he advised appellant not to use it because he did not think that it was providing additional value.

A different dermatologist saw Sam in April 2006 and treated her for minor skin problems such as allergy, rash, follicle infection and maybe fungus on the feet and nails. He prescribed

Silvadene and Centany creams to treat skin breakage in the buttocks area.

In April 2007, a doctor with training in internal medicine saw Sam at one of her care facilities. Her notes indicated that Sam suffered from pressure sores and mental challenges, and that she was underweight. On April 4, 2007, she weighed 86 pounds, and on May 30, 2007, she weighed 92 pounds. The pressure sores were treated, most likely by giving her antibiotic ointments.

Sam started seeing a different internist on May 13, 2009. She weighed 87 pounds and was able to walk with assistance from appellant. On June 15, 2009, Sam weighed 87 pounds, had responses to painful stimuli, and was prescribed antibiotics for a urinary tract infection. On October 22, 2010, Sam weighed 85 pounds. At this visit, appellant asked the internist to sign some care facility documents approving a diet of particular pureed food. He reviewed the diet and signed off because he was under the impression that the diet had been prepared by Sam's previous care facility.

Sam's Death; Report of Elder Abuse

On October 10, 2011, appellant went to the registration desk at the emergency room of Beverly Hospital in Montebello and said she needed help getting Sam out of their car, and that Sam needed food and water.[3] Appellant "seemed really anxious." Emergency room nurse Christopher Cardenas (Cardenas) went to appellant's car to get Sam. He saw she was "really crumpled," as

---

[3] Appellant lived 1.18 miles from Beverly Hospital in Montebello. The travel time in a car between the two locations is about three minutes.

if in a "fetal position," and she was "very stiff."[4] Sam had no pulse or heart activity. Cardenas was unable to put an IV into Sam because she did not have blood flow. Nurses took Sam to a bed in the emergency room.

Sam had bandages. Appellant told the hospital staff not to remove them.

Dr. Raul Lopez attended to Sam. After all life-saving measures failed, he pronounced her dead. Based on her lack of heart rate and rigidity, he believed she had been dead for "a few" hours before she was brought in. The staff unwrapped Sam's bandages, which caused appellant to get "a little bit upset." Cardenas observed pressure sores that had led to gangrene on Sam's hips, hands, and all over her body. According to Cardenas, some of the wounds were "unstageable," meaning they went all the way through to the bone.

Dr. Lopez noticed the following: Sam had a rotting smell emanating from her body; she was malnourished; there were pressure sores on her thighs, hips, abdomen, and throughout her vaginal area and buttocks; gangrene had set in on her hip and the hip bone was partially exposed; she had temporal wasting in her forehead; and she had muscle atrophy. He believed she had suffered overwhelming infection that led to organ failure and cardiac arrest. The wounds appeared as if they had developed over a long period of time. In Dr. Lopez's opinion, someone had neglected to get treatment for Sam's wounds, and this resulted in

---

[4] Cardenas explained that stiffness can result from contractures or the beginning of rigor mortis, which is the hardening the body undergoes after death. Rigor mortis starts to set in approximately 25 to 45 minutes after death.

her death. He concluded that Sam's condition took days to weeks to develop.

When Dr. Lopez questioned appellant about Sam's condition, she said Sam had been vomiting for several days and became ill as a result.

Based on Sam's condition, Cardenas was concerned that she was a victim of elder abuse. He instructed a staff member to call the police.

Initial Investigation

Montebello Police Officer Teri Connors responded to the hospital regarding a report of a death. At the hospital, she spoke to Cardenas and Dr. Lopez, and then spoke to appellant.

Appellant said she had been Sam's primary caretaker for two years, and that Sam was in the hospital because she had not eaten for a day. According to appellant, she had been giving Sam a natural antibiotic called colloidal silver. She claimed Sam had been walking up until two days earlier. At the time of the interview, appellant believed Sam was alive and could be taken home after she was fed.

Subsequently, Montebello Police Detective Ray Sulcer responded to the hospital and was briefed on the facts. He observed Sam's injuries.

Detective Sulcer's superiors decided to include the Los Angeles County Sheriff's Homicide Bureau in the subsequent investigation.

Appellant's October 11, 2010 Interview

Appellant was transported to the Montebello Police Station for interviews by Los Angeles County Sheriff's Department detectives.

She stated that she was a certified financial planner but gave up her job and was "hardly" working because she was Sam's primary caregiver. Sam had been under appellant's care for over three years after leaving Sam's last care facility. Regarding that facility, appellant stated that Sam was not there for long and explained, ". . . I wasn't really happy, I mean, the kitchen wasn't really giving her the food correctly, so [Sam] was losing weight, uh, I was afraid that she might not have enough weight for the doctor to do . . . macular degeneration surgery on her[.]" Appellant removed Sam and she had surgery. According to appellant, Sam did not go back because "they gave the bed to someone else."

Appellant removed Sam from a previous facility after the staff changed her diet without telling appellant, and after Sam started gaining "a lot of" weight For example, the staff fed pie to Sam. Also, Sam needed to leave because the staff placed her in a room next to a patient who liked to watch Spanish-language programs. Appellant removed Sam from yet another facility because she was crying every day.

As chronicled by appellant, Sam had skin problems because she had been regurgitating her food. Sam was not bedridden when she first came to live with appellant; she could walk "and all that" but could not climb stairs. She could get out of bed by herself, but that was rare. She needed assistance getting to and using the bathroom. Regarding sleeping arrangements, appellant and her husband moved Sam "from bed to bed" and from "room to room." Due to issues with regurgitating food, it was better for Sam to sleep in "like a reclining chair." Sam did not die at home; she died in the emergency room. When she bathed, she could stand up in a shower stall up until two days

before her death. Once Sam could not stand, appellant bathed Sam with her lying down in the shower stall. The morning of Sam's death, appellant gave Sam extracted juice but she did not swallow it. Instead, the juice began coming out of her nose and right ear. It was at that point appellant decided to take Sam to the emergency room.

According to appellant: she applied colloidal silver to Sam's skin because it worked much better than the doctor's prescription; the skin problem improved and Sam did not need to see the doctor for it anymore; Sam did not have pressure sores; rather, her skin was irritated by her vomiting and saliva; there was no gangrene, and there was no decay; when "you have the food get there, that cause[s] the skin to split open"; there was an open sore with pus; and when the pus mixed with the colloidal silver, "it" might have turned a brownish color.

Sam had lost weight over the last year but this did not concern appellant because it was gradual. Appellant thought about taking Sam to see a dermatologist for her sores. However, appellant did not go because it was Columbus Day (which was the day she took Sam to the emergency room) and she imagined that the dermatologist's office was closed. Appellant said, "I cannot afford for [Sam] to die at my home, they might jail me!" She said: "People might think I'm not taking care of my sister." When she brought Sam to the hospital, she was still blinking her eyes.

Canine Search on October 26, 2011

Coroner's Investigator Karina Peck (Peck) brought her canine to appellant's home to locate human remains. It was difficult for Peck to maneuver in the home because there were several areas with narrow pathways between stacks of boxes,

containers and clutter. In one room she saw stacks of gauze and gloves piled on a bed. To get access to certain areas of the home, Peck was forced to move things. The canine alerted to the floor of the shower in the bathroom off the master bedroom.

Appellant's October 26, 2011 Interview

During her second interview, appellant indicated that Sam had been sleeping on a black pad next to a reclining chair. The interviewing detective said there was not enough space for the black pad to be opened up at that location. Appellant disagreed. Later in the interview, appellant indicated that Sam slept on a mattress in the bathroom. On the day Sam died, appellant said she bathed Sam in the shower. The shower took about an hour. Afterwards, appellant applied colloidal silver to Sam's pressure sores. Appellant believed Sam was conscious because they made eye contact even if she made no sounds. Appellant fed Sam Chinese soup made by her husband, but Sam regurgitated it. They decided to give appellant juice but she would not swallow and the juice came out of her nose and ear. Only then did appellant decide Sam had to go to the emergency room. She and her husband dressed Sam and carried her to the car.

The interviewing detective asked appellant when she first noticed that the pressure sores were severe. She said, "That did not happen overnight" and "You know what? [Sam] gets so many sores, I don't pay attention." The interviewing detective said the sores on Sam's buttocks were down to the bone, and then said, "You can't tell me you didn't see those[.]" Appellant replied, "No, no, no, no." She also said, "This is what it is. She was healing." When pressed about when she first noticed "them getting that severe," appellant replied, "[Sam] gets so many sores. I do not jot

down when she has what and when she has what. All I do is . . . [¶] . . . [¶] . . . when she has a problem, I take care of her."

Per appellant, Sam had bruises when she left her last care facility but no pressure sores. Sores developed during the last year Sam was staying with appellant. Appellant said, "But they are not [pressure] sores."

Appellant helped Sam shower every day, and she saw Sam naked. In appellant's estimation, the "sores" developed over seven to 10 days. Later, she said it could have been five days, and that she did not "really" remember. Asked why she did not take Sam to the emergency room when appellant saw that the sores were severe, she replied, "Because they were not severe enough to go to the emergency room. Not . . . to me." In the past, Sam had sores just as severe on her legs and appellant cured them. Because she was treating Sam, appellant did not think the sores were a reason to seek outside help. Appellant was asked why she did not place Sam in a care facility and she stated "that a lot of [care facilities] do not want to give [Sam] her special diet and [Sam] has to have her special diet."

Autopsy; Conclusions

Deputy Medical Examiner Dr. Yulia Wang of the Los Angeles County Coroner's Department performed an autopsy on Sam and determined her weight was 66 pounds and her height was four feet, three inches. She had 600ccs of green liquid in her stomach. The cause of death was sepsis, a bacterial infection of the bloodstream, and it had two causes: pressure sores and pneumonia. Malnutrition potentially contributed to Sam's death because it could have impeded the healing of her pressure sores. Sam's cerebral malformation could have

contributed to the development of pressure sores if it made her less mobile.

Sam had pressure sores that ranged from Stage I to Stage IV. Stage IV is when the flesh has rotted away all the way to the bone. Based on the condition of the sores, it was not likely that Sam was walking two days prior to her death. Also, it was unlikely the pressure sores developed in less than 10 days; more probably, they developed over several months.

Expert Testimony

Dr. Diana Homeier, a geriatric medicine specialist, explained that a pressure sore is a breakdown in the skin that can be caused by a variety of conditions such as pressure, friction between a patient and the surface he or she is lying on, shearing force when a patient is moved from one position to another, immobility, body positioning and moisture. There are many ways to treat pressure sores and the most important treatment is to relieve the pressure by turning the patient or putting him or her on a special mattress. There are also medications such as antibiotics to treat infections, and sometimes the dead tissue in the wound needs to be cleaned out with surgery. There are silver-based dressings that can be used, but not colloidal silver.

Sam had pressure sores for weeks, potentially months. It was probable Sam was not walking the two days prior to her death. She had a wound that went to the bone. Some of the muscle had been ulcerated away, which would have made it difficult for Sam to move her legs and hips. Also, she had shortened muscles, or contractures, around her joints, and walking would have been difficult.

Dr. Homeier formed the opinion that Sam suffered neglect based on six factors: (1) the number and severity of the pressure

sores; (2) malnutrition and weight loss; (3) failure to seek medical care; (4) delay in seeking medical care; (5) isolation of Sam so others could not see her and provide aid; and (6) reports made by emergency room providers who recognized neglect as soon as they saw Sam. Also, Dr. Homeier concluded that neglect caused Sam's death.

Defense Evidence

Dr. John Fullerton is certified in internal medicine, hospice and palliative medicine, and geriatrics. He noted that it was unusual for a severely mentally retarded person like Sam to live past her teens. He opined that Sam had outlived her life expectancy and was in a terminal decline during the last year of her life. He noted that when a patient is in terminal decline, "you see things like skin lesions developing and not healing, you see things like a person not wanting to take in as much food or fluid, even with assistance."

After viewing photographs of Sam's pressure sores, Dr. Fullerton was asked if he had seen patients with "[these] kinds of sores." He stated that it was not unusual, and that he saw them "pretty regularly in a palliative care environment[.]" In his opinion, the photographs showed "terminal skin failure," a phenomenon that occurs at the end of life. Regarding whether there is a "recognized medical treatment for a skin condition such as" the one Sam had, Dr. Fullerton testified, "[I]t's palliative, so it's a comfort situation. So it's a palliative skin care approach, so not moving, disrupting the patient too often, particularly with the contractures there to the legs, and mostly symptomatic treatment."

He explained that "when patients are preterminal . . . or terminal, . . . the blood flow[s] . . . to the vital organs, like the

brain, the heart, the kidneys." If blood "preferentially goes to those organs, then the belief is that, in terms of regional blood flow changes, the blood flow is going away from the skin. [¶] . . . [¶] So that's the theory part behind the skin changes at life's end, or terminal skin failure."

Dr. Fullerton concluded that Sam's pneumonia was consistent with her being at the end of her life. He explained that pneumonia develops at the end of life for a number of reasons and is typically not treatable. He noted that antibiotics do not tend to work "like they would have worked if someone wasn't in an end-of-life terminal failure condition. It goes with the territory[.]"

When asked if he had an opinion as to how long the pressure sores took to develop, he stated, "[T]here's a chance they took days[.]" He explained that with "Kennedy ulcers," they can "occur within 48 hours of death and be severe as a marker of death coming[.]" He then stated, "So days or weeks."

According to Dr. Fullerton, Sam would not have lived longer or had a better quality of life if she had been in an acute care hospital or convalescent hospital. He opined that her pressure sores could not have been cured. Further, he testified, "As a palliative care patient, I felt she would have died a natural death, died the way she died. It wouldn't matter the level of care[.]"

Dr. Fullerton was asked if he formed an opinion about whether Sam was malnourished, or had suffered from malnutrition, before she died. He said it was hard to define. But he also said some weight loss is anticipated at the end of life. Then he said, "So, no, I didn't think she was undernourished."

With respect to colloidal silver, Dr. Fullerton had no problem with appellant's use of it to treat Sam because, according to appellant, it was working. He had no problem with Sam sleeping on a mat as long as it was "working and she's comfortable."

In Dr. Fullerton's view, a culture of bacteria was required to determine whether the cause of Sam's sepsis was pneumonia or pressure sores. He noted that Dr. Wang did not obtain any cultures.

DISCUSSION

I. Ineffective Assistance of Counsel.

To establish ineffective assistance of counsel, appellant must show (1) trial counsel's performance fell below an objective standard of reasonableness under prevailing professional norms, and (2) trial counsel's deficiencies resulted in prejudice. (*People v. Ledesma* (2006) 39 Cal.4th 641, 746.) Reversal is mandated if it is reasonably probable that the result would have been more favorable to a defendant but for his or her trial counsel's unprofessional errors. (*Ibid*.) But a "defendant need not show that counsel's deficient conduct more likely than not altered the outcome in the case." (*Strickland v. Washington* (1984) 466 U.S. 668, 693 (*Strickland*).) That standard is inappropriate because ineffective assistance "asserts the absence of one of the crucial assurances that the result of the proceeding is reliable[.]" (*Id*. at p. 694.) Consequently, the "result of the proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have undermined the outcome." (*Ibid*.) "A reasonable probability is a probability sufficient to undermine confidence in the outcome." (*Ibid*.)

Where "'the record contains no explanation for challenged [representation], an appellate court will reject [a] claim of ineffective assistance [of counsel] unless counsel was asked [to explain his performance] and failed to provide [an explanation], or unless there simply could be no satisfactory explanation.'" (*People v. Earp* (1999) 20 Cal.4th 826, 871.)

The judgment must be reversed due to the reasons set forth in our discussion below.

A. Trial Counsel's Refusal to Cooperate in Connection with this Habeas Matter.

Appellant's counsel on appeal contacted trial counsel, indicated that the Court of Appeal invited a petition for habeas corpus regarding ineffective assistance of counsel, and asked him for a declaration answering questions regarding why, inter alia, he did not present a mental health defense or hire a new pathologist after a previously retained pathologist became unavailable for trial.

Trial counsel refused to provide any explanation of his decision-making.

B. Failure to Present a Mental Health Defense.

1. *Relevant Law*.

Murder is the unlawful killing of a human being with malice aforethought. (§ 187, subd. (a).) Malice is implied "when the circumstances attending the killing show an abandoned and malignant heart." (§ 188, subd. (a)(2).)

"Implied malice may be proven by circumstantial evidence and has both a physical and mental component. [Citation.] The physical component is satisfied by the performance of an act, the natural consequences of which are dangerous to life. [Citation.] The mental component is established where the defendant knows

that his conduct endangers the life of another and acts with conscious disregard for life. [Citation.]" (*People v. McNally* (2015) 236 Cal.App.4th 1419, 1425.) "[A] finding of implied malice require[s] a showing of defendant's awareness of the risk to life created by his [or her] conduct." (*People v. Dellinger* (1989) 49 Cal.3d 1212, 1218.) Thus, a defendant's "shocking pattern of neglect" is not enough, by itself, to establish implied malice even if it caused a death of a person under his or her care. (*People v. Caffero* (1989) 207 Cal.App.3d 678, 685–686 (*Caffero*).)

In *Caffero*, the defendants had a daughter who was born premature. Two weeks later, the mother was concerned that her daughter was jumpy and called the hospital emergency room for advice. (*Caffero*, *supra*, 207 Cal.App.3d at p. 681.) She said her daughter was blinking and jerking. She was told to contact her physician or, if she thought it was a real emergency, to bring her daughter to the emergency room. The mother decided to wait until her mother-in-law could see the child. The next day, the mother-in-law expressed the opinion that the child had colic and diaper rash. A day after that, the mother took her daughter to the emergency room at 10:40 p.m. A triage nurse observed that the child had good color and deemed her nonurgent. At midnight, the nurse noticed that the child was pale, had sores on her anus and foot and fecal staining on her skin. A doctor began treating the child. By 1:30 a.m., her temperature had plummeted to 93.2 degrees and her blood pressure was extremely low. She died later that day due to an overwhelming Escherichia coli infection. (*Ibid.*)

The defendants were charged with murder and felony child abuse. At the preliminary hearing, a doctor testified that the child's "skin was stained from prolonged contact with fecal

matter causing it to break down into open sores in the perianal area." (*Caffero*, *supra*, 207 Cal.App.3d at p. 685.) Another doctor testified that the "sores were the worst he had ever seen over many years of contact with sick children and probably required several days to develop." (*Ibid*.)

The murder charge was dismissed by a magistrate and the People appealed. According to the People, the defendants' failure to discharge their parental duty care demonstrated implied malice. The *Caffero* court stated: "It is reasonably inferable that [the child's] death was caused by grossly inadequate care at the hands of defendants, specifically their failure to maintain minimally acceptable standards of hygiene and to seek timely medical care for [the child]. However, there is no evidence defendants were actually aware their conduct endangered [the child's] life. Although the physicians testified [the child's] sores probably began to develop in the days before defendants brought her to the hospital, no evidence suggested defendants knew they were life-threatening. [The child's] grandmother had examined her the day before she was brought to the hospital and advised [the mother] she had 'colic and diaper rash.' [The mother] had applied a 'cream' to the affected area. Two days before she was brought to the hospital [the mother] observed that [the child] was 'blinking and jerking.' She reported this to hospital emergency room personnel but the advice she received conveyed no sense of urgency about the need for immediate medical attention. Indeed, when [the child] arrived at the hospital she exhibited no obvious symptoms of her life-threatening condition. Her temperature was only marginally above normal and her skin color was good. On admission, an experienced triage nurse deemed her 'non-

urgent.'" (*Caffero*, *supra*, 207 Cal.App.3d at p. 685.) Due to this reasoning, *Caffero* affirmed the dismissal.

2. *Mental Health Evidence*.

The record establishes that at least as of 2007 appellant became very demanding with Sam's health care providers and social workers. Appellant wanted to dictate terms to care facilities and control Sam's diet, and the inferences suggest appellant wanted social workers to keep searching for care facilities in the hope that one of them would meet appellant's unrealistic expectations. With one care facility, appellant said she wanted to prepare Sam's meals, and was unwilling to accept the recommendation of a dietician.

Based on appellant's statements, there is an indication that she believed that she had successfully treated Sam's skin conditions with colloidal silver, and that colloidal silver was a superior treatment option to all others.

It would have been easy to move Sam into a care facility. Yet appellant persisted in feeding, bathing, toileting and bathing Sam. Appellant told one facility she wanted to sleep with Sam on occasion. There is a reasonable inference that appellant was devoted to Sam, and that appellant took her responsibilities seriously and obsessively.

When appellant brought Sam to the emergency room, appellant's behavior could be seen two ways. Either she was making up facts and trying to cover up her crime or she believed what she was saying. What she was saying was so bizarre—that Sam only needed to eat and could be taken home after she was fed, that she did not have pressure sores, and that vomiting caused the "sores"—it is reasonable to infer she was divorced from reality and not acting with guile.

In connection with appellant's petition for writ of habeas corpus, she relies on evidence from Dr. Richard I. Romanoff, a licensed clinical psychologist. He evaluated appellant and concluded there is "strong support for a finding that [appellant] suffers from a case of obsessive-compulsive personality disorder and likely also suffers from a hoarding disorder." He noted "evidence of impaired reasoning and judgment by [appellant] in connection with her care of her sister in the final days of her sister's life."

In his report, Dr. Romanoff relied on DSM 5[5] to explain that individuals with obsessive-compulsive personality disorder "attempt to maintain a sense of control through painstaking attention to rules[.]" Also, they "'stubbornly and unreasonably insist that everything be done their way and that people conform to their way of doing things. They often give very detailed instructions about how things should be done and are surprised and irritated if others suggest creative alternatives. At other times they may reject offers of help even when behind schedule because they believe no one else can do it right.'"

Dr. Romanoff opined that due to her disorder, appellant's "perfectionism and rigidity directly interfered with her ability to recognize she was reaching the limits of her own ability to provide care for her sister by herself, blinding her to her need to ask others for help[.]" He further opined, "Rigidly focused on repetitive patterns of behavior that had worked in the past, I believe [appellant] was incapable of rapidly adjusting to the dramatic deterioration in her sister's situation caused by the development of a particularly severe collection of sores that

---

[5] Diagnostic and Statistical Manual of Mental Disorders.

appear to have coincided with other serious health difficulties (i.e.[,] a developing pneumonia). Programmed [by her illness] to rigidly persist with the pattern of activities that had worked in the past, I believe she was incapable of recognizing or adjusting to this 'new' situation, and because of this rigidity and because of tendencies to avoid contact with others, that also directly flowed from her illness, it was not until her sister's situation deteriorated to a point of no return that [appellant] finally recognized the seriousness of the situation in the hours preceding her arrival at the emergency room. While it remains unclear exactly how long it took for her sister to go from reasonably healthy to the state she was in the hours preceding her death, I believe that whether this took days or weeks, [appellant] was unable to recognize or act on her sister's deteriorating medical situation as a direct consequence of the above described dynamics."

Further, he stated: "[H]er often repeated descriptions of attempts to force her sister to swallow or to methodically apply colloidal silver and bandages makes good sense when considered in the context of her above described illness, and I believe it is a fundamental misunderstanding to attribute these activities to any absence of care or concern by [appellant] for her sister. Rather, it was precisely because of a growing and intensifying care and concern that [appellant] began to pursue, in an increasingly rigid and rushed fashion, the types of compulsive actions that had in the past resulted in improvement for her sister."

3. *Trial Counsel Erred by not Presenting a Mental Health Defense*.

Dr. Romanoff's opinion offers a plausible explanation for appellant's behavior; she suffered from a disorder that distorted her thinking, caused her to rigidly cling to rules, and resulted in her failure to understand the risk to Sam if she did not receive timely medical attention. Thus, appellant had a mental health defense that negated malice under the reasoning of *Caffero*, which could have resulted in appellant being acquitted of murder. Because trial counsel refused to provide an explanation for his failure to present this defense, and there is no apparent justification for this failure, we find his performance to be constitutionally deficient.

C. Failure to Call a Pathologist.

1. *Relevant Law*.

Second degree murder and death due to elder abuse require the prosecution to prove causation. (*People v. Latham* (2012) 203 Cal.App.4th 319, 327; § 368.)

A medical expert is permitted to give an opinion on the cause of an injury. "Such a diagnosis need not be based on certainty, but may be based on probability; the lack of absolute scientific certainty does not deprive the opinion of evidentiary value. [Citation.]" (*People v. Mendibles* (1988) 199 Cal.App.3d 1277, 1293, overruled on other grounds in *People v. Soto* (2011) 51 Cal.4th 229, 248, fn. 12.) Further, "as long as the jury finds that without the criminal act the death would not have occurred when it did, it need not determine which of the concurrent causes was the principal or primary cause of death. Rather, it is required that the cause was a substantial factor contributing to the result[.]" (*People v. Catlin* (2001) 26 Cal.4th 81, 155.)

2. *Relevant Facts*.

Dr. Harry Bonnell was the defense's expert pathologist. In forming his opinions, he went to the coroner's office to investigate and was able to review the slides of Sam's brain and vital organs. On Monday, June 27, 2016, during trial, the defense informed the trial court that Dr. Bonnell suffered a heart attack over the weekend and would be unable to testify. The defense moved for a mistrial. But the defense did not request a brief continuance to determine whether a new pathologist could be secured for trial.

The trial court asked for an offer of proof regarding Dr. Bonnell's testimony. Trial counsel proceeded to explain that Dr. Bonnell disagreed with Dr. Wang and would testify that "bacteria is different in the lungs, for pneumonia, than it is for [pressure sores], and without doing a culture of the bacteria, you don't know if the sepsis is from the pneumonia, which would have been something natural in the process of dying, or if it was from the [pressure sores][.]" Moreover, Dr. Bonnell would testify that sepsis cannot be assumed without doing a culture for verification; the elderly die of pneumonia on a regular basis, and pneumonia could have been the cause of Sam's death; brain damage may have played an important role in Sam's death, particularly given the malformation of her brain; Sam would not have been in pain due to the sores because the sensory nerves are in the skin and subcutaneous tissue; appellant's conduct "was not reckless, and may not have even been negligent;" Sam had food in her stomach, which established that she was not malnourished; and her skin failure was no surprise because it was end-of-life organ failure.

The trial court asked whether Dr. Fullerton could testify on all of "these issues[.]" Trial counsel replied, "He didn't . . . go to the coroner's office, he didn't look at the slides[.]" The trial court

stated: "Can you talk about the fact that perhaps [Dr. Fullerton] [thinks] that . . . what the victim suffered from in this case was the natural dying process; that . . . she had no pain, more than likely, because of the sensory nerves; that the brain damage that the victim had in this matter was a condition that was such that people generally don't live past a certain age; that your client was not negligent; that she was not malnourished; that the death can be attributed to perhaps what you characterize as end-of-life organ failure[.]" Trial counsel stated that Dr. Fullerton could not testify as to all those things. Rather, he would testify as to a more global view.

The trial court wanted to know whether, "even in a generic" or global sense, Dr. Fullerton could "touch on" whether Sam's death could be attributed to either the condition Sam was born with or the natural death process as opposed to criminal negligence.

Trial counsel stated that Dr. Bonnell "has more clinical experience, hands-on experience, being, for years, he was a deputy medical examiner. And Dr. Fullerton is more of an ivory tower type. He teaches a lot and gives lectures[.]" The trial court interjected and stated that ivory tower types "can formulate opinions, as well." It asked what would be in Dr. Fullerton's testimony.

After trial counsel made an offer of proof regarding Dr. Fullerton the trial court concluded he "can cover a lot of" the same ground as Dr. Bonnell would have. Continuing on, the trial court stated, "I will allow [Dr. Fullerton] to review Dr. Bonnell's notes, because one expert can rely on another expert's opinions and notes and what have you. If he forms other conclusions or

wants to augment his conclusions, he can. And I will give a curative instruction to the jury" about Dr. Bonnell's absence.

The motion for mistrial was denied. Dr. Homeier and Dr. Wang testified for the prosecution and opined that Sam would not have died if she have received timely medical attention. Dr. Fullerton testified, indicating that Sam was at the end of her life and suffering from terminal skin failure. He opined that Sam was not in pain, and no amount of treatment would have prevented her death.

To support her petition for writ of habeas corpus, appellant relies on a report from Dr. Frank Sheridan, an anatomic pathologist, a neuropathologist, and a forensic pathologist. Dr. Sheridan agreed with the autopsy report that Sam "died of sepsis due to gangrenous decubitus ulceration and/or bronchopneumonia." But he disagreed with the "manner of death." Based on the microscopic exam report, he opined that the pneumonia was likely aspiration pneumonia, which "is typically rapid in progression due to the irritant effect of food and gastric acid on the alveolar tissue in the lungs." He noted that Sam had a long history of difficulty eating due to her brain condition and the lack of teeth. He stated that for a person with feeding problems like Sam, "aspiration pneumonia [was] a constant danger" that could have "occur[ed] even when the patient [was] being well cared for." Even if Sam was considered malnourished, that did not mean she was not being fed. 'There was liquid food material in the stomach at autopsy. [Sam's] weight was not exceptionally low. She was a generally small person. Also, people in a terminal state will often appear . . . malnourished due to their generalized catabolic state."

Dr. Sheridan concluded that "there [was] not compelling evidence in this case to attribute [Sam's] death to caretaker abuse or neglect."

3. *Trial Counsel Erred by not Calling a Pathologist*.

It is apparent from the proceedings below that trial counsel wanted to fight fire with fire, and Dr. Bonnell was that fire. He had been a medical examiner, and he went to the coroner's office to investigate and review Dr. Wang's slides of Sam's brain and vital organs. Dr. Fullerton was inherently less credible due to his lack of experience as a medical examiner. Yet credibility was critical. The relevant question presented to the jury was whether neglect was a substantial factor contributing to Sam's death, or whether it could be explained solely by Sam's unstoppable terminal decline. The answer, ultimately, is unknowable. But the law allows experts to offer opinions. The more credible the expert, the more likely appellant's chances were of convincing the jury that Sam had simply reached the end of her life and that medical attention would have been futile. Trial counsel refused to explain why he did not retain a replacement for Dr. Bonnell. We conclude the failure to replace Dr. Bonnell was error depriving appellant of effective assistance of counsel.[6]

D. Failure to Object to *Kurtzman* Error.

1. *Relevant Facts*.

The trial court instructed the jury as follows: "Now, I should say to you, you have count 1, which is second-degree

---

[6] The People assert that trial counsel could not have found a new pathologist during trial. While that is possible, it is speculation because trial counsel declined to explain whether he tried but was unable to retain a new pathologist. Notably, trial counsel did not seek a trial continuance so that a new pathologist could be retained.

murder, and then the lesser to that is involuntary manslaughter; count 2, you have felony elder abuse, and a lesser to that is misdemeanor elder abuse. [¶] Before you can even consider a lesser crime, you all must unanimously vote not guilty on the greater crime. You cannot move on to the lesser if you all find the defendant—let's assume you find her guilty of second-degree murder, that's the greater crime, you cannot—then you don't need to move on to the lesser. You only move on to the lesser if you unanimously find the defendant not guilty of the greater crime."

Trial counsel did not object.

2. *Trial Counsel Erred by not Objecting to the Trial Court's Instruction Based on Kurtzman.*

Under *Kurtzman*, it is error for a trial court to instruct a jury not to deliberate on or consider a lesser offense until there is unanimous agreement on the greater offense. (*Kurtzman*, *supra*, 46 Cal.3d at p. 335; *People v. Dennis* (1998) 17 Cal.4th 468, 536.)

By instructing the jury it could not consider a lesser included offense unless it voted unanimously on the greater offense, the trial court committed *Kurtzman* error. Though trial counsel was not asked to explain why he did not object, there is no satisfactory explanation. Trial counsel's failure to object qualifies as *Strickland* error.

E. Prejudice.

Given that the evidence of appellant's behavior was consistent with Dr. Romanoff's diagnosis, we conclude it is reasonably probable that appellant would not have been convicted of murder but for trial counsel's failure to present a mental health defense. Though the other errors may not have been prejudicial in isolation, we conclude that they combined

with the first error to undermine the reliability of the trial as it related to elder abuse. Even though there was no dispute regarding the severity of Sam's pressure sores, the evidence of neglect and causation was contested and based solely on opinion. Also, the jury may have been more primed to convict on count 2 without having an accurate picture of appellant's mental state. Based on the *Kurtzman* error, the jurors were instructed not to deliberate on greater and lesser offenses at the same time. Rather, they were required to consider the greater offenses first, which may have solidified their thinking without fair and proper consideration of whether appellant had only committed lesser offenses. In this context, trial counsel's errors served to undermine confidence in the convictions. (*People v. King* (2010) 183 Cal.App.4th 1281, 1298.)

Though in the next section we conclude the convictions were supported by substantial evidence, this only means the jury heard enough evidence to be able to convict. Our analysis of ineffective assistance of counsel focuses on what the jury *did not* hear, and *how* the jury was told to consider what they did in fact hear. Because the jury did not hear certain evidence, and because the jury was improperly instructed, the resulting convictions were unreliable. Once again, we do not hold that the presence of the missing evidence or the absence of *Kurtzman* error was more likely than not to lead to a better result for appellant. Rather, we are saying that the *possibility* of a better result is too real to ignore, and the United States Constitution therefore demands reversal.

II. Sufficiency of the Evidence.

Even though we are reversing the convictions, we must assess the sufficiency of the evidence to determine whether they

are supported by sufficient evidence. Only if they are supported by sufficient evidence can appellant be retried without offending the Double Jeopardy Clause.

According to appellant, her murder conviction should be reversed due to insufficient evidence of implied malice and causation, and her elder abuse conviction should be reversed due to insufficient evidence of causation. We are tasked with determining "whether, on review of the entire record in the light most favorable to [each offense], any rational trier of fact could have found the elements of the offense beyond a reasonable doubt." (*People v. Young* (2005) 34 Cal.4th 1149, 1180.) After review, we conclude that the convictions were supported by sufficient evidence.

A. Implied Malice.

Appellant contends that even if the evidence established she provided inadequate care, it confirmed that she believed she was acting in the best interests of Sam. In particular, she claims the evidence demonstrated that she believed colloidal silver was an adequate remedy, Sam needed to be restricted to a particular diet, and she needed to be placed in a facility that shared the same viewpoints. Also, appellant contends there was no evidence she actually appreciated the risk of not taking Sam to the hospital earlier. Moreover, she argues she had no motive to place Sam's life at risk. Based on these factors, she argues a finding of malice was based on speculation and therefore the murder conviction is reversible due to insufficiency of the evidence. (*People v. Marshall* (1997) 15 Cal.4th 1, 35 ["mere speculation cannot support a conviction"].)

We disagree.

Sam had an IQ of 9 and a mental age of 18 months. She required assistance for daily tasks such as dressing, undressing, hygiene, bathing, and toileting. She was placed in care facilities from 1984 to 2002 and then off and on until September 11, 2008. At least at one facility, she developed pressure sores. Appellant repeatedly stated to others she was Sam's caretaker, and appellant explained to the detectives that she had been treating Sam's sores. These facts support the inference that appellant knew full well that Sam needed total care and could not take care of her own medical conditions.

Prior to her death, Sam developed pressure sores ranging from stage I to stage IV, she stopped eating, and she could not stand in the shower. Dr. Lopez and Dr. Homeier opined that the pressure sores took weeks, maybe even months to develop, and that Sam died because of neglect. The facts and medical opinions support a reasonable inference that appellant acted in conscious disregard of Sam's life by failing to secure medical treatment for a life-threatening condition.

According to Sam, *Caffero* refutes any inference that she was aware of the risk of her neglect.

Sam's condition cannot be compared to that of the child in *Caffero*. In *Caffero*, the child did not exhibit a life-threatening condition upon her admission to the hospital. Sam, on the other hand, was either dead or near death and therefore beyond treatment. Further, her pressure sores, gangrene and smell exhibited a life-threatening condition. While it was speculative in *Caffero* to infer the parents understood the danger to their child given what they could or could not see and what they were told by others, it was reasonable for the jury below to conclude appellant knew the danger of not taking Sam to the hospital

earlier. In addition, an inference of her appreciation of the risk is supported by the following: she covered the pressure sores with bandages and protested when hospital staff wanted to remove them; she told the hospital staff Sam had been vomiting but did not mention the pressure sores; appellant told hospital staff and the police Sam was alive; and appellant was evasive during her police interviews. All of the foregoing demonstrated consciousness of guilt. (*People v. Cole* (1903) 141 Cal. 88, 90 ["Deception, falsehood, and fabrication as to the facts of the case are treated as tending to show consciousness of guilt, and are admissible"].)[7]

B. Causation.

Dr. Lopez opined that Sam most likely died due to cardiopulmonary arrest secondary to sepsis that was the result of not getting treatment for her pressure sores. Dr. Wang opined that the cause of Sam's death was sepsis caused by pressure sores and pneumonia. Dr. Homeier testified that neglect caused Sam's death because she had pressure sores that had become infected. The foregoing evidence was sufficient to establish that the pressure sores were due to neglect and caused sepsis that contributed to Sam's death.

Appellant urges the opposite conclusion because Dr. Fullerton's testimony undermined the opinions and conclusions of Dr. Wang and Dr. Homeier. But because we are applying the substantial evidence test, we must treat

---

[7] Appellant requests that we reduce her second-degree murder conviction to involuntary manslaughter if we conclude that her actions contributed to Sam's death but did appreciate the risk of those actions. Because there is sufficient evidence of malice, this issue is moot.

Dr. Fullerton's testimony as though it does not exist. (*Holmes v. Lerner* (1999) 74 Cal.App.4th 442, 445 ["All conflicts in the evidence are resolved in favor of the prevailing party"].) The sole question is whether the testimony of Dr. Wang and Dr. Homeier support a finding of causation. They do.

Next, appellant quotes CALJIC No. 2.01 as providing that if circumstantial evidence permits two reasonable interpretations, one pointing to guilt and the other to innocence, the jury must adopt the interpretation that points to innocence. By adverting to this instruction, she asks us to play the role of a factfinder instead of a reviewing court. We decline. That is not our role, nor is it within our authority.

III. Denial of the Motion to Suppress.

Even though we are vacating the convictions, we reach the issue of whether the trial court erred when it denied appellant's motion to suppress because appellant's statements to the police are likely to be used if there is a retrial and appellant would otherwise be denied review.

Appellant contends that her statements to the police should have been suppressed due to a violation of her rights under the Fourth, Fifth and Sixth Amendments of the United States Constitution, including a violation of *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*). Specifically, she posits that she was unlawfully detained without reasonable suspicion at the hospital and possibly later; she was subjected to an unlawful de facto arrest even if the initial detention was lawful; she was subjected to custodial interrogation without a *Miranda* warning; the statements she made to the police were not voluntary; and she was impermissibly questioned after she requested Yellow Pages so she could call an attorney.

When reviewing denial of a motion to suppress, we accept the trial court's express and implied factual findings if they are supported by substantial evidence, but we exercise independent judgment as to whether a challenged search and seizure was legal. (*People v. Arebalos-Cabrera* (2018) 27 Cal.App.5th 179, 185–186.) The substantial evidence test "requires us to view 'the record in the light most favorable to the verdict, resolving all conflicts in the evidence and drawing all reasonable inferences in favor of the verdict[.]'" (*Minnegren v. Nozar* (2016) 4 Cal.App.5th 500, 510.)

A. Relevant Proceedings.

Appellant moved to suppress the statements she made at the police station on October 11, 2011. She argued that her Fourth Amendment rights were violated when she was unlawfully "arrested in the hospital parking lot and unlawfully transported to the Montebello Police Department without probable cause." She further contended that "what might have started out as a legitimate investigatory detention clearly became an unlawful detention at least prior to the time that the Sheriff's Detectives commenced their interrogation at the Montebello Police Department." As well, she argued that her Fifth Amendment rights were violated when the detectives interrogated her without giving her a *Miranda* warning.

In the opposition papers, the prosecutor averred that appellant's statements were made during investigatory questioning; appellant voluntarily agreed to be transported to the police station for an interview; she was not in custody; she was free to leave at any point during the interview; and she did in fact leave of her own free will at the conclusion of the interview. As an exhibit to the opposition, the prosecutor attached a form

signed by appellant that stated the following: "I, [appellant], understand that I am being asked by officers from the Montebello Police Department to go to the Police station for an interview. I hereby freely consent to this voluntarily, with the understanding that I have the right to refuse consent. I acknowledge that I am not under arrest, that I am free to leave the station at any time I choose, and that return transportation will be provided for me, if requested." On the same form, directly above the section heading entitled "**WITNESS TRANSPORTATION CONSENT FORM**" that appellant signed, the *Miranda* rights were listed. Appellant did not sign the *Miranda* portion of the form.

At the suppression hearing, Officer Connors testified that upon viewing Sam's body, she called Lieutenant Michael Flores of the Montebello Police Department and expressed the belief that Sam's death may possibly be caused by neglect. Afterwards, Lieutenant Flores called the homicide unit of the Los Angeles County Sheriff's Department to advise them of the situation. When Officer Connors questioned appellant, she did not handcuff appellant, frisk her, or tell her she was not free to leave, and did not restrict her movement. Officer Connors said she was going to ask questions about Sam but appellant did not have to answer. Appellant voluntarily agreed to speak. Their conversation took place in a waiting room with about 20 to 40 people present. Later at the police station, Officer Connors saw appellant sitting in a room. She left the room and approached Officer Connors. Officer Connors told appellant that she should wait and talk to the sheriff's detectives. After her interview, Officer Connor escorted appellant to the police station lobby and left her there. She was free to leave. According to Lieutenant Flores, appellant's car was

impounded and held as evidence for the sheriff's department. She would not have been allowed to drive it to the police station.

Officer Oscar Chavez testified that at the hospital, appellant indicated she was willing to be transported to the police station for an interview. At no point did he restrict her freedom of movement. He had her sign a consent form for transportation. Prior to transporting her, Officer Chavez did not handcuff her, nor did he search her or pat her down. At the police station, appellant never said she wanted to leave. Lieutenant Flores testified that he offered to buy appellant food while she was waiting. She never said she wanted to leave the police station to get some food. He proceeded to buy food for her. Detective Sulcer confirmed that appellant was free to move around while waiting in the police station to be interviewed.

Deputy Joe Espino of the Los Angeles County Sheriff's Department testified that when he went to the police station, appellant was in an unlocked interview room. He never told appellant that she was under arrest. She was free to leave the interview room. During the interview, she was nearest to the door and it was not locked. Throughout the interview, neither Deputy Espino nor his partner raised their voices or accused appellant of neglecting her sister. Fifteen minutes into the interview, Detective Kenney advised appellant that she was free to leave. At another juncture, Detective Kenney asked appellant, "You're here of your own free will" and appellant responded by saying either "I know" or "Yes, I am." Two hours into the interview, appellant complained that it was 5:00 p.m. However, she also said that she could wait, and that she was willing to spend more time with the detectives. At the conclusion of the interview, appellant was free to leave.

Appellant was not arrested after the interview.

Diane Marquez, the communications supervisor for the Montebello Police Department, testified that police records showed that a woman was transported to the station at 12:24 p.m. by Officer Chavez.

Appellant testified she arrived at the hospital at about 8:30 a.m. and she first saw a Montebello Police Officer at about 10:00 a.m. Officer Connors took her driver's license. Subsequently, appellant asked for the return of her driver's license, and Officer Connors refused. Eventually, she returned it to appellant prior to leaving for the police station. Officer Chavez said police department policy was to interview every resident who resided with a deceased person, and he told appellant the interview would have to be at the police station. He said he had to transport her. She told him that she wanted to drive her own car because she was parked in a tow zone. Asked if she consented to go to the police station, she first replied, " . . . I told Officer Chavez that I was very hungry, . . . that I wanted to go back home to have my . . . lunch." Later, she testified that she told Officer Chavez she did not want to go to the police station because she needed to make funeral arrangements. She also said she did not want to go in a marked patrol car because that was for criminals. She maintained that Officer Chavez said appellant had to get into his car because "he was radioed" that he was supposed to bring her to the police station, and that she could not go any other way because otherwise he would get in trouble with his supervisor. She thought she would get in trouble if she did not get into his car. At no point did she feel free to leave. When she arrived at the police station, Officer Chavez asked her to sign the witness transportation consent form. Appellant explained

that she signed the form because Officer Chavez wanted her to, and because he did in fact transport her.

Appellant testified that she repeatedly complained to various people at the police station that the form she signed said she was free to leave yet the police would not let her leave. Soon after she arrived and was told she could not leave, she asked for the Yellow Pages so that she could call an attorney for help. No one gave her a phone book. When appellant said she wanted to go home to have Chinese soup, her request was denied. She said she was very hungry, and the police offered her a sandwich from Subway. She accepted it because she had no other choice. Appellant did not believe she had the right to leave. She offered the following rationale: "It is because one of the police officers in the report writing unit told me that they will have the entire police force after me, and, if need be, they will even call . . . back-up officers to help them, to make sure that I stay inside the police station, because I'm not supposed to leave the police station until I'm being interviewed by the two sheriff's deputies. That's . . . what I was told."

Trial counsel argued, inter alia, that appellant was under de facto arrest because she did not consent to go to the police station, and she was not free to leave the police station once she arrived.

The trial court found that appellant was not detained at the hospital because Officer Connors did no more than conduct an investigatory interview and obtain background information. Nor was she in custody when she was transported to the police station because she consented. With respect to the interview, the trial court noted that it lasted approximately two hours, she was advised that she was not under arrest, and that she was free to

leave at any time. The trial court stated, "The fact that she may have waited for the Los Angeles Sheriff's Department [detectives] for hours, it appears to this [trial] court that she did so of her own volition." The trial court indicated that it had reviewed the video of the interview and "noted no evidence of police coercion or overbearing conduct or tactics utilized during the interview at the station." According to the trial court, the detectives "were pretty soft-toned in speaking to" appellant, and the video "reflects that the detectives never raised their voices, and appeared to remain calm during the duration of the interview." At no point did appellant express the desire to leave the interview. "In fact," stated the trial court, appellant "seemed anxious to tell her side of the story to the police, to the point the officers had to stop her, before she got ahead of herself, and try to take it step by step. As the [appellant] demonstrated during the course of her testimony, she tends to go on to other subjects."

The trial court denied the motion. It stated, "In the end, considering the totality of the circumstances surrounding [appellant's] interview at the hospital location, transportation to the police station, and, ultimately, her interview at the station, a reasonable person under the same or similar circumstances would not have believed that she was in custody at any time that these events occurred."

B. No Unlawful Detention or De Facto Arrest Prior to Questioning by the Detectives.

"A detention occurs when an officer intentionally applies physical restraint or initiates a show of authority to which an objectively reasonable person innocent of wrongdoing would feel compelled to submit, and to which such a person in fact submits. [Citations.]" (*People v. Linn* (2015) 241 Cal.App.4th 46, 57.) If a

detention "exceeds the boundaries of a permissible investigative stop, the detention becomes a de facto arrest requiring probable cause." (*In re Carlos M.* (1990) 220 Cal.App.3d 372, 384.) Unlawful detentions and arrests are searches and seizures in violation of the Fourth Amendment. (*People v. Rodriguez* (2006) 143 Cal.App.4th 1137, 1147; *People v. Curtis* (1969) 70 Cal.2d 347, 356, fn. 6.) If police conduct violates the Fourth Amendment, "the exclusionary rule requires that all evidence obtained as a result of such conduct be suppressed. [Citations.]" (*People v. Williams* (1988) 45 Cal.3d 1268, 1299.)

Appellant posits that she was detained when Officer Connors took her driver's license and held on to it until she was leaving for the police station. According to appellant, this was unlawful because Officer Connors could not "point to specific articulable facts that, considered in light of the totality of the circumstances, provide[d] some objective manifestation that" appellant might have been involved in criminal activity. (*People v. Souza* (1994) 9 Cal.4th 224, 231.)

Analogizing to *People v. Valenzuela* (1994) 28 Cal.App.4th 817, 823 (*Valenzuela*), *Barber v. Superior Court* (1973) 30 Cal.App.3d 326 (*Barber*), and *Florida v. Royer* (1983) 460 U.S. 491 (*Royer*), appellant argues that a reasonable person in her position would not have believed she was free to leave the hospital while her driver's license was being held by Officer Connors. As we discuss, the cited cases are distinguishable and do not support the argument.

Valenzuela determined that a detention occurred when an immigration agent saw a motorist at an agricultural stop, decided that the motorist might be an illegal alien, directed the motorist to the side of the road, inquired into the motorist's immigration

status "for the purpose of checking that status," took away the motorist's green card, and obtained consent to both search the trunk and conduct a search by a drug-sniffing dog. (*Valenzuela*, *supra*, 28 Cal.App.4th at p. 832.) In *Valenzuela*, those circumstances were "inherently coercive" because the officer was "withholding the only document that evidenced [the motorist's] right to be in the United States" until the motorist consented to the searches. Thus, the consent was not valid. (*Ibid*.) Notably, the search revealed narcotics and defendant was arrested. (*Id*. at p. 822.)

Per *Barber*, a detention occurs when an officer takes a motorist's driver's license and tells him to wait in his vehicle while the officer runs warrant checks. (*Barber*, *supra*, 30 Cal.App.3d at p. 330.)

In *Royer*, two detectives stopped the defendant at an airport, identified themselves as policemen, and asked if he had a moment to speak to them. He said yes and handed over his airline ticket and driver's license. When the defendant became nervous after several pointed questions, the detectives said they were narcotics investigators and had reason to suspect him of transporting narcotics. Still holding onto the airline ticket and driver's license, the detectives asked the defendant to accompany them. They took him to a room containing a small desk and two chairs. Without the defendant's consent or agreement, one of the officers retrieved the defendant's luggage from the airline and brought it to the room. The detectives asked if the defendant would consent to a search. He produced a key and unlocked one of the suitcases. One of the detectives opened the suitcase and found marijuana. The defendant consented to the detectives opening the second suitcase; they found more marijuana. They

arrested the defendant. The entire sequence took about 15 minutes. (*Royer*, *supra*, 460 U.S. at pp. 493–495.) The Supreme Court stated, "Asking for and examining [the defendant's] ticket and his driver's license were no doubt permissible in themselves, but when the officers identified themselves as narcotics agents, told [the defendant] that he was suspected of transporting narcotics, and asked him to accompany them to the police room, while retaining his ticket and driver's license and without indicating in any way that he was free to depart, [the defendant] was effectively seized for the purposes of the Fourth Amendment." (*Id*. at p. 501.) The court determined that these "circumstances surely amount to a show of official authority such that 'a reasonable person would have believed that he was not free to leave.' [Citation.]" (*Id*. at p. 502.) The state's argument that the defendant voluntarily consented to a search was rejected as "untenable." (*Id*. at p. 501.)

Here, unlike in *Valenzuela*, appellant was not told the police were inquiring into her immigration status, nor did they search her vehicle. Also, holding a driver's license is not equivalent to holding a green card because the latter proves an immigrant's lawful presence in the United States and implicates a liberty interest but the former does not. Unlike in *Barber*, appellant was not told to remain in a certain location while the police determined if there were any warrants for her arrest. Unlike in *Royer*, the police did not say they suspected appellant of a crime, move her to a room, retrieve her belongings, ask if she would consent to a search, and search her belongings. Rather, Officer Connors questioned appellant in a hospital waiting room, did not suggest he suspected her of a crime, and told her that she did not have to talk. Moreover, Officer Connors did not restrain

appellant in any way. After talking to Officer Connors, appellant spoke to Officer Chavez and signed a form averring her understanding that she did not have to go to the police station and could leave at any time. Appellant was not arrested after being interviewed at the hospital, further distinguishing this case from *Valenzuela*, *Barber* and *Royer*. Though her car was impounded, there is no evidence of when that occurred, and when appellant knew about it. We conclude appellant was not detained at the hospital.

Next, appellant implies that she was detained and/or subjected to a de facto arrest either during the time she was transported to the police station or when she was at the police station waiting to be interviewed. But Officer Chavez testified that appellant said she was willing to be voluntarily transported to the police station to be interviewed by sheriff's detectives. Appellant signed a witness transportation form indicating that she consented to being transported to the police station to be interviewed, she had the right to refuse consent, and she was not under arrest. At the police station, her movement was not restricted. Officer Connors testified that appellant was free to leave, and Detective Sulcer testified that appellant was free to move around the police station while she was waiting to be interviewed. Lieutenant Flores testified that appellant never said she wanted to leave. Deputy Espino testified that appellant was in an unlocked interview room when he arrived, and that she was free to leave it. The trial court's finding that appellant was not detained during her transport to the police station or at the police station prior to being questioned was supported by

substantial evidence that she did not submit to a show of authority and was not detained.[8]

Because we conclude there was no detention, we conclude that there was no detention that ripened into a de facto arrest without probable cause.

C. No Custodial Interrogation by the Detectives.

Miranda protects an accused's Fifth Amendment privilege against self-incrimination. Absent a custodial interrogation, *Miranda* rights are not implicated. (*People v. Guilmette* (1991) 1 Cal.App.4th 1534, 1540–1541.)

When determining whether a person is in custody, a court employs an objective test. "[T]he pertinent inquiry is whether there was a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest. [Citation.] The totality of the circumstances is considered and includes '(1) whether the suspect has been formally arrested; (2) absent formal arrest, the length of the detention; (3) the location; (4) the ratio of officers to suspects; and (5) the demeanor of the officer, including the nature of the questioning.' [Citation.] Additional factors are whether the officer informed the person he or she was considered a witness or suspect, whether there were restrictions on the suspect's freedom of movement, whether the police were aggressive, confrontational, and/or accusatory, and whether the police used interrogation techniques to pressure the suspect.

---

[8] Appellant offers conflicting evidence. For example, she testified that law enforcement personnel told her she could not leave the station until she was interviewed, and that if she left the station, they would send "the entire police force after" her. As dictated by the substantial evidence test, we are required to disregard such evidence.

[Citation.]" (*People v. Davidson* (2013) 221 Cal.App.4th 966, 971–972.)

Appellant contends that the totality of the circumstances establishes that she was subject to a custodial interrogation, including that she was detained at the hospital, not free to leave the police station, told the police would come after her if she left the police station, the length of her encounter with the police, and the nature of the questioning.

As we have indicated, substantial evidence established that she was not detained at the hospital or at the police station while waiting to be interviewed. The interrogation lasted only two hours, and she was told she could leave after 15 minutes. She sat closest to an open door. Moreover, appellant does not dispute the trial court's findings that the video of the interview established no evidence of police coercion or overbearing conduct or tactics, and it further established that the detectives never raised their voices and she never asked to leave.

Under the totality of the circumstances, we conclude that the interrogation was not custodial, and that a *Miranda* warning was not required.

D. Consent Voluntarily Given.

A search preceded by consent is reasonable under constitutional standards only if the consent was "voluntary and not in response to an express or implied assertion of authority. [Citations.]" (*People v. Strawder* (1973) 34 Cal.App.3d 370, 376, disapproved on other grounds in *People v. Bustamante* (1981) 30 Cal.3d 88, 96.) Involuntary admissions cannot be used against a criminal defendant. (*People v. Underwood* (1964) 61 Cal.2d 113, 120–121.) "In determining whether [an admission] was voluntary, "'[t]he question is whether defendant's choice to

[speak] was not 'essentially free' because his [or her] will was overborne.'" [Citation.]" (*People v. Carrington* (2009) 47 Cal.4th 145, 169.) The question is assessed by examining the totality of the circumstances. (*Ibid.*)

Though appellant maintains that any consent was not freely and voluntarily given, the evidence showed that her will was not overborne during the course of the interview. There is no dispute that the detectives remained calm. They did not claim to have specific evidence connecting her to any crimes, nor did they make any threats or promises of leniency. Cases cited by appellant do not alter our thinking. The detectives did not gain her consent in a manner found invalid by *People v. Challoner* (1982) 136 Cal.App.3d 779, 782, i.e., they did not gain consent after seeking to search her house without knocking, approaching her with guns drawn and asking for consent to search the house moments after arresting others at gunpoint. *Stern v. Superior Court* (1971) 18 Cal.App.3d 26, 30 does not aid appellant because it stated that "[c]onsent secured at gunpoint following an illegal arrest cannot be relied upon to render . . . evidence obtained by a search and seizure pursuant thereto admissible." The record establishes that appellant was not arrested, and consent was not obtained at gunpoint. The detectives did not, unlike the officer in *Crofoot v. Superior Court* (1981) 121 Cal.App.3d 717, 725–726, obtain consent by implying appellant would be incriminating herself or admitting participation in illegal activity if she refused to consent to a search.

E. No Violation of the Right to Consult an Attorney.

Based on *Miranda*, *Edwards v. Arizona* (1981) 451 U.S. 477, 484–485 (*Edwards*) and *Minnick v. Mississippi* (1990) 498 U.S. 146, 153 (*Minnick*), the Supreme Court held that when a

defendant is subjected to a custodial interrogation and then asks for counsel, the interrogation must stop. (*Montejo v. Louisiana* (2009) 556 U.S. 778, 794.) Because appellant asked for the Yellow Pages, she contends that she effectively asked for an attorney and that she should not have been questioned. But her interrogation was not custodial. (*Id.* at p. 795 [the *Miranda-Edwards-Minnick* line of cases apply "only in the context of custodial interrogation"].) Thus, we conclude that appellant's rights were not violated.

DISPOSITION

The judgment is reversed and remanded to the trial court. Upon remand, the People may elect to retry appellant on the charged offenses.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
ASHMANN-GERST

We concur:

_____, P. J.
LUI

_____, J.
HOFFSTADT